Public Prosecutor v Michael Anayo Akabogu

HIGH COURT (PULAU PINANG) — CRIMINAL CASE NO 47-4-91
JEFFREY TAN JC
9 FEBRUARY 1995

Statutory Interpretation — *Construction of statutes — Conjuctive or disjunctive — Provisions leading to proof in criminal proceedings — Whether to be construed narrowly — Evidence Act 1950 s 32(1)(i) & (j)*

Evidence — *Statement — Statement of person who cannot be called as witness — Admissibility — Whether provisions of s 32(1)(i) & (j) to be read conjuctively or disjunctively — Evidence Act 1950 s 32(1)(i) & (j)*

The accused was charged with drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952. During the prosecution's case, the prosecution applied under s 32(1)(i) of the Evidence Act 1950 ('the Act') to admit four statements recorded from four Thai nationals under s 112 of the Criminal Procedure Code (FMS Cap 6), whose attendance could not be secured to testify at the trial, on the grounds that the statements were made in the course of, and for the purpose of the investigation into the alleged offence committed by the accused. The defence, however, contended that the conditions to s 32(1) were not satisfied, as the witnesses could be contacted, but insufficient attempts were made to contact them. The defence further contended that the statements were not admissible as they were not made by public officers in the discharge of their duty, as required by s 32(1)(j) of the Act. Both the prosecution and the defence applied for a ruling as to whether s 32(1)(i), which states that a statement made in the course of or for the purpose of an investigation into an offence is relevant, and s 32(1)(j), which states that the statement must be made by a public officer in the discharge of his duties, are to be read conjunctively or disjunctively.

Held, dismissing the prosecution's application:

(1) It is basic that for oral evidence to be admissible, it must be direct and must not offend the hearsay rule. However, s 32 of the Act provides one of the exceptions to the hearsay rule. While s 32(1)(a)–(h) relaxed the hearsay rule for both civil and criminal proceedings, s 32(1)(i) and (j) apply only to criminal proceedings.

(2) It is trite that any ambiguity in the language of provisions leading to proof in criminal proceedings, such as s 32(1)(i) and (j), are to be narrowly construed. A disjunctive reading of s 32(1)(i) will be too great a breach to the hearsay rule, and would give a wider interpretation than the natural meaning of the language used.

(3) With the exception of s 32(1)(j) which is preceded by the word 'where', s 32(1)(a)–(i) are preceded by 'when'. This denotes a separate case for s 32(1)(j). Also, with the introduction of the

word 'and' between s 32(1)(i) and (j), s 32(1)(j) has qualified that a statement admitted under s 32(1)(i) to be one which is made by a public officer in the course of his duties.

(4) Sub-sections 32(1)(i) and (j) were therefore specifically inserted as a joint package to be read conjunctively, an interpretation fortified by the provisions of s 32(2) that it shall apply only to criminal proceedings, unlike the rest of the provisions of s 32 that apply to all proceedings.

[Bahasa Malaysia summary

Tertuduh telah dituduh kerana mengedar dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Semasa kes pihak pendakwa, pihak pendakwa telah memohon di bawah s 32(1)(i) Akta Keterangan 1950 ('Akta tersebut') untuk menerima empat kenyataan yang dicatatkan daripada empat orang yang berbangsa Thai di bawah s 112 Kanun Prosedur Jenayah (NMB Bab 6), di mana kehadiran mereka tidak boleh diperolehi untuk memberi keterangan di perbicaraan, atas alasan bahawa kenyataan tersebut telah dibuat semasa, dan untuk tujuan penyiasatan ke dalam kesalahan yang dikatakan telah dilakukan oleh tertuduh. Walau bagaimanapun, pihak pembela berhujah bahawa syarat kepada s 32(1) tidak dipenuhi, oleh kerana saksi-saksi tersebut boleh dihubungi, tetapi percubaan yang mencukupi untuk menghubungi mereka tidak dibuat. Pihak pembela mengatakan selanjutnya bahawa kenyataan tersebut tidak boleh diterima kerana mereka tidak dibuat oleh pegawai awam semasa menjalankan kewajipan mereka, seperti yang disyaratkan oleh s 32(1)(i) Akta tersebut. Kedua-dua pihak pendakwa dan pembela telah memohon untuk suatu perintah sama ada s 32(1)(i), yang menyatakan bahawa bahawa sesuatu kenyataaan yang dibuat semasa atau untuk tujuan penyiasatan ke dalam sesuatu kesalahan adalah relevan, dan s 32(1)(j), yang menyatakan bahawa kenyataan itu mesti dibuat oleh seorang pegawai awam semasa menjalankan kewajipannya, harus dibaca secara penghubung atau secara penyarak.

Diputuskan, menolak permohonan pihak pendakwa:

(1) Adalah asas bahawa supaya keterangan lisan oleh diterima, ia hendaklah bersifat langsung dan tidak bercanggahan dengan rukun keterangan dengar cakap. Sementara s 32(1)(a)–(h) mengendurkan rukun dengar cakap untuk kedua-dua prosiding sivil dan jenayah, s 32(1)(i) dan (j) hanya terpakai dalam prosiding jenayah.

(2) Adalah lazim bahawa sebarang ketaksaan di dalam bahasa peruntukan yang membawa kepada bukti dalam prosiding jenayah, seperti s 32(1)(i) dan (j), hendaklah ditakrifkan secara sempit. Bacaan s 32(1)(i) secara penyarak akan merupakan suatu perlanggaran yang terlalu besar terhadap rukun dengar cakap, dan akan memberikan suatu tafsiran yang lebih luas daripada maksud asli bahasa yang digunakan.

(3) Kecuali s 32(1)(j) yang bermula dengan perkataan 'di mana', s 32(1)(a)–(i) bermula dengan 'apabila', yang menunjukkan kes yang berasingan untuk s 32(1)(j). Juga, dengan pengenalan perkataan 'dan' di antara s 32(10(i) dan (j) tersebut, s 32(1)(j) telah membataskan kenyataan yang diterima di bawah s 32(1)(i) kepada sesuatu kenyataan yang telah dibuat oleh seorang pegawai awam semasa menjalankan kewajipannya.

(4) Sub-seksyen 32(1)(i) dan (j) dengan itu, adalah dimasukkan secara khas sebagai suatu pakej bersama untuk dibacakan secara penyarak, suatu tafsiran yang diperkukuhkan oleh peruntukan s 32(2) bahawa ia hendaklah terpakai hanya kepada prosiding jenayah, tidak seperti lain-lain peruntukan di bawah s 32 yang terpakai dalam semua prosiding.]

Notes

For cases on the construction of statutes, see 11 *Mallal's Digest* (4th Ed) paras 1308–1368; [1990] Mallal's Digest 1166; [1991] Mallal's Digest 1910; [1992] Mallal's Digest 1613–1624; [1993] Mallal's Digest 1250–1257.

For a case on a statement made by a person who cannot be called as a witness, see 7 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1566.

Cases referred to

PP v Goh Kim Looi [1994] 2 CLJ 809 (refd)
PP v Mohd Jamil bin Yahya & Anor [1993] 3 MLJ 702 (refd)
Sim Tiew Bee v PP [1973] 2 MLJ 200 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 112
Evidence Act 1950 ss 31A, 32, 78A, 90A–C

Ishak bin Mohd Yusoff (Deputy Public Prosecutor) (*Ahmad Fairuz bin Zainol Abidin* with him) for the Public Prosecutor.

Karpal Singh (*Jagdeep Singh Deo* with him) (*Karpal Singh & Co*) for the accused.

Jeffrey Tan JC: The accused was tried on the following charge:

> Bahawa kamu pada 14 November 1990, pada jam lebih kurang 6.30 petang di International Departure Lounge Lapangan Terbang Antarabangsa, Bayan Lepas, di dalam Daerah Balik Pulau, di dalam Negeri Pulau Pinang, telah mengedar dadah merbahaya, iaitu 1,074.4g heroin dan oleh itu, kamu telah melakukan kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama.

At the close of the prosecution's case, the accused was acquitted and discharged.

During the prosecution's case, the prosecution applied under s 32(1)(i) of the Evidence Act 1950 to admit four statements recorded from four

A Thai nationals under s 112 of the Criminal Procedure Code (FMS Cap 6), whose attendance could not be secured to testify at this trial.

' In his application, the learned DPP asserted that the statements were made in the course of, and for the purpose of the investigation into the alleged offence committed by the accused, and met as such with the B conditions for admission under s 32(1)(i) of the Evidence Act 1950.

Before 16 July 1993, s 32 dealt with the admissibility of statements of relevant facts made by persons who could not be called as witnesses in one of the following four circumstances:

C (i) if a person is dead;

(ii) if a person cannot be found;

(iii) a person who has become incapable of giving evidence; or

(iv) a person whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears D to the court unreasonable (see *Sim Tiew Bee v PP* [1973] 2 MLJ 200);

and if it falls under one of the eight cases specifically set out in s 32(1)(a)–(h).

E With ss 32(1)(i), (j) and 32(2) that read as follows:

(1)(i) when the statement was made in the course of, or for the purpose of an investigation or inquiry into an offence under or by virtue of any written law; and

(j) where the statement was made by a public officer in the discharge of his duties.

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(2) the provisions of paragraphs (i) and (j) of subsection (1) shall apply only in relation to a criminal proceeding,

it now appears that s 32 provides for the admissibility of statements of persons who cannot be called as witnesses in one of any four circumstances, G and if it falls within one of the ten cases (with the insertion of ss 32(1)(i) and (j)). The statements recorded under s 112 portend to fall under the ninth case, that is s 32(1)(i).

In urging its admission, the learned DPP cited the recent decisions of *PP v Goh Kim Looi* [1994] 2 CLJ 809, where a s 112 statement recorded from a civilian was admitted under s 32(1)(i), and *PP v Mohd Jamil bin* H *Yahya & Anor* [1993] 3 MLJ 702, where a similar statement was accepted as evidence although the court with misgivings to its creditworthiness, placed no reliance on it.

The defence, however, contended that the conditions to s 32(1) were not satisfied, as the witnesses could be contacted, but insufficient attempts I were made to contact them, and even by then it was far too late. The defence further contended that the statements were not admissible as they were not made by public officers in the discharge of their duty as required by s 32(1)(j).

On that controversy, the learned DPP and defence counsel both applied for a ruling whether ss 32(1)(i) and (j) are to be read: A

(a) conjunctively, in which case admissibility would be determined on the pre-conditions to s 32(1); or

(b) disjunctively, in which case the statements would be admissible. B

Sections 32(1)(i) and (j), together with ss 31A, 32(2), 78A, 90A, 90B and 90C of the Evidence Act 1950, are supplemental provisions inserted by Act A851, effective from 16 July 1993.

As stated earlier, before 16 July 1993, s 32 admitted statements of persons who could not be called as witnesses for one of the four circumstances, and within one of the eight clearly provided cases. Each of the eight cases in ss 32(1)(a)–(h) is solitary and distinct, and bears little similarity or resemblance to the others, discernible not just from the events, but also by the absence of a conjunction after each case. C

The law of evidence relating to criminal proceedings has always been proof beyond a reasonable doubt, while in civil proceedings, it is proof on a balance of probabilities. Those canons are both sacrosanct and inviolable, and any change even by statute to those hallowed standards of proof must be unmistakable, unambiguous and without any doubt whatsoever. D

It is also basic that oral evidence must be direct, and if it offends the hearsay rule, it will not be admissible. However, there are exceptions to the hearsay rule, and s 32 is one of such exceptions. As such, it is an inroad to the hearsay rule, and the rationale is clearly explained in *Sarkar on Evidence* (14th Ed, 1993) at pp 560–561, quoting from Wigmore: E

> The purpose and reason of the hearsay rule is the key to the exceptions to it. The theory of the hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free from the risk of inaccuracy and untrustworthiness so that the test of cross-examination would be a work of supererogation. Moreover, the test may be impossible of employment — for example, by reason of the death of the declarant — so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape. A perception of these two principles (a necessity for the evidence and a circumstantial probability of trustworthiness) and their combined value has been responsible for most of the hearsay exceptions. F G H
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> (1) The scope of the first principle may be briefly indicated by terming it the necessity principle. The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane or otherwise unavailable for the purpose of testing.
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> (2) The second principle which is termed circumstantial guarantee of trustworthiness, is in the nature of a practical substitute for the ordinary test of cross-examination. We see that under certain circumstances the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner. I

A The following different classes of reasons underlie the exceptions:

(a) where, the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed;

(b) where, even though a desire to falsify might present itself, other conditions, such as the danger of easy detection or the fear or punishment B would probably counteract its force; and

(c) where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.

According to the learned authors of *Sarkar*, the exceptions to the hearsay C rule in para (a) to s 32(1) (dying declaration), rest on reason (b) (fear of divine punishment); those in para (b) (entries in the courts of business, etc) rest on reasons (a), (b) and (c); that in para (e) (declaration against pecuniary interest) rests on reason (a); those in para (d) (opinion as to public right, etc) rest on (a), (b) and (c); those in paras (c) and (f) (declarations about pedigree) rest on (a) and (c); and those in s 32(h) D (expressions of feelings) rest on reason (a).

The Evidence Act 1950 is the *vade-mecum* for all proceedings, but certain provisions apply only to civil proceedings while others are peculiar to criminal trials. However, there are provisions such as s 32 (pre-amendment) applying equally to civil as well as criminal proceedings.

E While ss 32(1)(a)–(h) relaxed the hearsay rule for both civil and criminal proceedings, most intriguingly, the provisions of ss 32(1)(i) and (j) apply only to criminal proceedings. However, ss 32(1)(i) and (j) were specifically grafted onto s 32, and was therefore intended to fall within the rationale as explained in *Sarkar on Evidence*. However, the reasons behind F those two amendments are not discernible and indeed, the learned judge in *PP v Mohd Jamil* [1993] 3 MLJ 702 expressed his dilemma in placing s 32(1)(i) and (j) to any of the three classes of reasons underlining s 32.

Reading s 32(1)(i) and (j) disjunctively, the ramifications could even be unthinkable, as seen from the following not improbable scenario:

G (a) statements are recorded from civilians (including civilian complainants) ostensibly in the course of and for the purpose of an investigation;

(b) one of the four pre-conditions for admission being an attendance which could not be procured without an amount of delay or expense H which under the circumstances of the case appears to the court unreasonable, statements are recorded from persons known at the time of recording would be difficult to be procured or even intended could not be procured;

(c) those statements are highly incriminatory of an accused; and

I (d) those statements are then tendered and admitted and the accused is convicted, without the incriminating statements being tested by cross-examination.

The weight and probative value to be given to declarants' statements would depend on the facts and circumstances of each case, but that is no

safeguard against any abuse and misuse of s 32(1)(i), if it is to take effect disjunctively. It can even be anticipated of a conviction quite beyond reproach on recorded statements alone tendered by an investigation officer declaring that none of his material witnesses could be secured without an inordinate amount of delay or expense. A

A disjunctive reading of s 32(1)(i) will therefore be too great a breach, and an unacceptable inroad to the hearsay rule. It is trite that penal provisions are to be narrowly construed; if arguably ss 32(1)(i) and (j) are not penal provisions, then undoubtedly they are provisions leading to proof in a criminal proceeding and conviction of an offence. The infirmities, ambiguities and defects in the language of the inserted provisions must therefore be narrowly construed, but a disjunctive reading of the inserted sub-sections would give to it a wider interpretation than the natural meaning and impact of the language used. B C

Sub-sections 32(1)(i) and (j) are conjoined by 'and' between it, conspicuously absent in s 32 (pre-amendment) in cases (a)–(h). Brought in together, the intention of the legislature was therefore to bind the two inserted sub-sections, which incidentally is the only way it could be rationalized with reason (a) underlining s 32. D

There is reason further for this conjunctive construction. Each of the eight cases in s 32 (pre-amendment) is preceded by the word 'when', the signature word to mark out the contingency, and s 32(1)(i) is similarly preceded by 'when'; the singular exception being s 32(1)(j) preceded by 'where'. E

The same word in the same provision must carry the same meaning, and if indeed it was intended for s 32(1)(i) and (j) to be read disjunctively, the legislature would surely have followed the proven format and language of s 32 (pre-amendment), and s 32(1)(j) would be preceded by 'when' just as in the other nine cases. F

This departure from the proven term 'when' denoting a separate case and the introduction of 'and' between (i) and (j) singled out s 32(1)(j) for special application. Sub-sections 32(1)(i) and (j) were therefore specifically inserted as a joint package to be read conjunctively, an interpretation fortified by the provisions of s 32(2) that it shall apply only to criminal proceedings, quite unlike the rest of the provisions of s 32 that apply to all proceedings. G

Conjoined by 'and', s 32(1)(j) qualifies that a statement under s 32(1)(i) must be one where the statement was made by a public officer in the course of his duties. H

The prosecution's application to have admitted those four statements was therefore refused.

Application dismissed.

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Reported by Isabel Liong